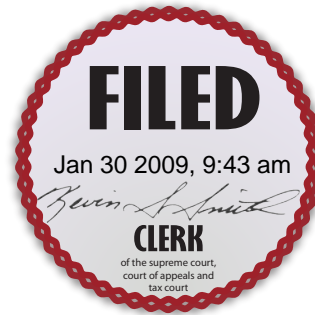


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

CHRISTINA ROSE KLINEMAN
Indianapolis, Indiana

RUTH JOHNSON
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

PAUL JOHNSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)

No. 49A05-0808-CR-451

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William E. Young, Judge
Cause No. 49G20-0102-CF-35392

January 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Paul Johnson (“Johnson”) appeals an order revoking his probation after a hearing at which the trial court reviewed a probable cause affidavit but did not receive evidence. Johnson contends he was denied due process when the trial court revoked his probation without taking evidence. We reverse.

Facts and Procedural History

On August 6, 2001, Johnson pleaded guilty to Conspiracy to Commit Dealing in Cocaine. He was sentenced to twenty years imprisonment, with ten years suspended, and was ordered to serve two years probation.

On May 12, 2008, the State filed a notice of violation alleging that Johnson (1) was arrested on May 7, 2008 on a charge of domestic battery, (2) tested positive for ethanol on April 21, 2008, and (3) failed to report to the drug lab on May 1, 2008.

On July 3, 2008, Johnson appeared for a probation violation hearing. No evidence was presented at the hearing, but the trial court reviewed the probable cause affidavit related to the domestic battery charge, which had by then been dismissed. The trial court found that Johnson had violated the terms of his probation and ordered him to serve the ten years of his sentence previously suspended. Johnson now appeals.

Discussion and Decision

Johnson contends that he was denied due process when the trial court revoked his probation at the conclusion of a hearing at which the State presented no evidence but the trial court informally reviewed a probable cause affidavit related to a dismissed domestic battery

charge.

Probation is a matter of grace and not a right to which a criminal defendant is entitled. Jones v. State, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). The trial court determines the conditions of probation and may revoke probation if the proper procedures have been followed and the State establishes, by a preponderance of the evidence, that the conditions of probation are violated. Goonen v. State, 705 N.E.2d 209, 211 (Ind. Ct. App. 1999).

Although probationers are not entitled to the full array of constitutional rights afforded defendants at trial, there are procedural and substantive limits on the revocation of probation imposed by the Due Process Clause of the Fourteenth Amendment. Woods v. State, 892 N.E.2d 637, 639 (Ind. 2008). The minimal requirements of due process to be afforded a probationer at a revocation hearing include: (a) written notice of the claimed violations of probation; (b) disclosure of the evidence against him; (c) an opportunity to be heard and present evidence; (d) the right to confront and cross-examine adverse witnesses; and (e) a neutral and detached hearing body. Id. (citing Isaac v. State, 605 N.E.2d 144, 148 (Ind. 1992)). See also Ind. Code § 35-38-2-3(d) (providing that “the court shall conduct a hearing concerning the alleged violation.”).

“[A]n arrest standing alone will not support the revocation of probation.” Weatherly v. State, 564 N.E.2d 350, 352 (Ind. Ct. App. 1990). “Evidence must be presented from which the trial judge could reasonably conclude that the arrest was appropriate and that there is probable cause to believe the defendant violated a criminal law before the revocation may be sustained.” Id. Even when a probationer admits a violation, he or she must be given an

opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation. Woods, 892 N.E.2d at 640.

At Johnson's probation revocation hearing, recorded in an eight-page transcript, the trial court advised Johnson that the court needed to find out why his battery case was dismissed, and then engaged in the following exchange:

Court: Okay. We'll show that a review of the probable cause affidavit showing that he fled from [sic] the police. Yeah, he took a beating too, but he gave as good as he got. And that he started it by punching this young lady in the face.

Johnson: Can I say something, Your Honor.

Court: Then a baseball bat got brought into it. And then there was injury to a ten year old. And so I find that there is probable cause to believe that a crime was committed. Show that he will be sentenced to ten years. How much credit?

Counsel: Ten days.

(Tr. 5-6). The court went on to summarily conclude that "you got that positive test." (Tr. 7.)

As such, Johnson's probation was revoked although the State introduced no witnesses or evidentiary exhibits, Johnson was afforded no right of cross-examination, and Johnson was not given the opportunity to present evidence on his behalf.

The State points out that Johnson did not specifically object to the informal procedure employed. This is true. However, the failure to hold an evidentiary proceeding as mandated by law before revoking probation violates a probationer's due process rights and constitutes fundamental error. Dalton v. State, 560 N.E.2d 558, 560 (Ind. Ct. App. 1990). Accord Tillberry v. State, 895 N.E.2d 411, 415 n.1 (Ind. Ct. App. 2008) (revocation followed

informal conversation between the judge and parties); Cooper v. State, 894 N.E.2d 993, 997 (Ind. Ct. App. 2008) (wherein no evidentiary hearing was conducted), reh'g denied¹; Eckes v. State, 562 N.E.2d 443, 445 (Ind. Ct. App. 1990) (at revocation hearing, judicial notice taken of another proceeding, without supporting documents or testimony).

Here, there was no evidence submitted from which the trial court could have found probable cause to believe that Johnson committed a crime while on probation. Likewise, there was no evidence from which the trial court could have found that Johnson tested positive for ethanol or failed to appear for drug testing. Because the trial court failed to conduct a hearing that comported with Johnson's due process rights and failed to elicit evidence to establish, by a preponderance of the evidence, that Johnson violated one or more terms of his probation, the revocation must be reversed.

Reversed.

MATHIAS, J., and BARNES, J., concur.

¹ We note that this case is not yet certified.